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DEPARTMENT OF STATE

Washington, D.C. 20520

December 1, 1981

MEMORANDUM OF LAW

Legal Authority for Emergency Food Assistance to Poland

This memorandum addresses the legal issues raised by the proposed emergency food assistance to Poland: specifically, whether the Commodity Credit Corporation (CCC) can sell corn to Poland for dollars on concessional repayment terms under the Commodity Credit Corporation Charter Act, as amended ("Charter Act").

Section 5 of the Charter Act, 62 Stat. 1070, 15 U.S.C. Section 714c, expressly authorizes the procurement of agricultural commodities for sale to foreign governments, the export of agricultural commodities, and the removal or disposal of surplus agricultural commodities. Section 4 of the Charter Act, 15 U.S.C. Section 714b, gives the CCC broad discretion and authority to accomplish these and other specific powers set forth in section 5. However, section 5 requires that in its purchasing and selling operations with respect to agricultural commodities, the CCC "shall, to the maximum extent practicable consistent with the fulfillment of (its) purposes and the effective and efficient conduct of its business, utilize the usual and customary channels, facilities, and arrangements of trade and commerce."

Although the issue is not free from doubt, we believe that the Charter Act provides sufficient authority for the proposed sale in this particular case. The CCC is expressly authorized to procure agricultural commodities for sale to foreign governments and to export such commodities. Although section 5's mandate to function in a businesslike manner to the maximum extent practicable would normally preclude any sale on concessional repayment terms, normal commercial sales to Poland simply are not practicable under current economic circumstances. In this particular case, then, a concessional sale appears justifiable.

Moreover, corn could possibly be determined by the Department of Agriculture to be a surplus commodity within the meaning of the Charter Act, which expressly authorizes the removal and disposal of "surplus agricultural commodities." Corn is presently considered in surplus supply for some

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purposes. For other purposes, such as sections 105A(d) (1) and (f) (1) of the Agricultural Act of 1949, 7 U.S.C. Section 1444c(d) (1) and (f) (1) (concerning program acreage and cropland set asides), no determination has been made whether corn is in surplus supply with respect to the 1982 crop. In the absence of any statutory criteria for "surplus agricultural commodities: under the Charter Act, the Department of Agriculture has considerable discretion in making such a determination. A determination that corn is presently in surplus supply for purposes of the Charter Act would further justify its sale on concessional rather than strictly commercial terms, since surplus commodities are more difficult to sell. For example, earlier this year the CCC concluded a sale of surplus dairy products to Poland on such concessional terms.

In conclusion, we believe that a sale of corn to Poland on concessional repayment terms may be justified under the particular circumstances of this case. However, any future sale on concessional terms would require careful consideration of the circumstances in light of CCC's mandate to operate in a businesslike manner and must be justified in particular circumstances.

We do not believe that the proposed sale of corn to Poland on concessional terms poses any conflict with our international obligations. Although Article XVI:3 of the General Agreement on Tariffs and Trade (GATT) and Article 10 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code) establish general relevant obligations, it seems unlikely that any other corn exporter would be adversely affected by the proposed sale to Poland since it presumably would not displace normal commercial sales. Consequently, objection and the sale by a party to the GATT or subsidies Code appears unlikely.

The concessional nature of the proposed sale would probably render applicable U.S. cargo preference legislation (46 U.S.C. 1241(b) (1), which generally requires carriage of at least 50 percent of the gross tonnage of commodities on U.S.-flag vessels ("to the extent such vessels are available at fair and reasonable rates") whenever the USG advances funds or credits in connection with furnishing commodities to a foreign nation. In this regard, the House of Representatives Committee on Merchant Marine and Fisheries held a hearing on November 9 concerning the applicability of U.S. cargo preference legislation to the recent sale by the Commodity Credit Corporation (CCC) of butter to New Zealand and to other CCC sales to Poland. The Committee clearly considered cargo preference legislation applicable and the Maritime Administration agreed.

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